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No. 91-1523

In The
Supreme Court of the United States
October Term, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,
Petitioners
v.
SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents

On Writ of Certiorari
to the
United States Court of Appeals
for the
Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The National Association of State Boards of Education hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Counsel for Petitioners has been obtained. The consent of the Counsel for Respondents was requested but refused.

The interest of the National Association of State Boards of Education in this case arises from the fact that the decision below reduces the legal significance of State Board of Education determinations in establishing standards for the education of children with disabilities and for the expenditure of funds for the education of such children under the Individuals with Disabilities Act, 20 U.S.C. §§ 1401 *et. seq.*

Because the Court of Appeals held that a learning disabled child's parents are entitled to State reimbursement even where a unilateral private placement does not meet State education standards, those standards are rendered meaningless to private schools which indirectly receive State funding under the Act. The brief which *amicus curiae* is requesting permission to file

will contain a discussion of both the legal and economical ramifications of such a holding.

Respectfully submitted,

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OTHER

National Association of State Directors of Teacher Education and Certification, *Manual on Certification and Preparation of Educational Personnel in the United States*, Kendall Hunt Publishing Co., 1991 Page 7

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INTEREST OF THE AMICUS CURIAE

The *National Association of State Boards of Education* (NASBE) is a nonprofit, private association that represents State and territorial boards of education in national affairs and assists those boards in the fulfillment of their duties. NASBE's principal objectives are to strengthen State leadership in education policymaking, promote excellence in

the education of all students, advocate equality of access to educational opportunity, and assure responsible lay governance of public education.

NASBE's interest in this case arises from concern about the apparent willingness of the United States Court of Appeals for the Fourth Circuit to set aside the authority of States and State Boards of Education to establish and enforce reasonable standards for education, in contravention of traditional understandings of the respective roles of federal, State, and local governments in governance of education, and in apparent violation of the intent of relevant Congressional policies and previous pronouncements of this Court. If the position of the Fourth Circuit is upheld, it would appear that State and local boards of education will have become largely irrelevant in planning and providing educational services to a large group of students in the United States, leaving those bodies solely with the responsibility to fund programs which parents unilaterally select without regard for established standards.

NASBE supports the provision of high quality educational services for all of the children of the nation, regardless of the presence of handicapping conditions. NASBE believes, however, that the decision of the Fourth Circuit is contrary to that goal, and supports the request of Petitioners that this Court accept and reconsider the decision below in this case.

Petitioner has consented to the filing of this brief.

ISSUES PRESENTED FOR REVIEW

1. There is a conflict among the Circuits on this question concerning the application of a decision of this Court, *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 385 (1985), as well as federal law and regulation in the education of children with disabilities. The decision of the Fourth Circuit in the instant case appears to have at least some support under a decision by the Fifth Circuit, *Alamo Heights Independent School District v. State Board of Education*, 790

F.2d 1153 (5th Cir. 1986), but is in direct conflict with a decision by the Second Circuit, *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989).

2. The decision of the Fourth Circuit conflicts with principles of local control and the need for schools to have a reasonable measure of control over school budgets, planning, and operations as set forth in previous decisions of this Court.

3. The decision of the Fourth Circuit is contrary to the best interests of students, in that it may serve as a disincentive to private schools to comply with standards established by State education authorities for the education of children with disabilities.

ARGUMENT: REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF DECISIONS OF THIS COURT AND OF FEDERAL LAW AND REGULATION IN THE EDUCATION OF CHILDREN WITH DISABILITIES

The Individuals with Disabilities Education Act (IDEA) requires States to ensure that funds received from the federal government for education of children with disabilities be used "only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities," 20 U.S.C. § 1413(a)(2). The term, "free appropriate public education," is defined in 20 U.S.C. § 1401(a)(18) as special education and related services that, among other things, "meet the standards of the State educational agency," and "are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

The requirement that standards be met was reinforced in an opinion letter of Dr. Judy A. Schrag, Director, Office of Special Education Programs, U.S. Department of Education, dated August 24, 1990, addressed to William J. Reedy, Esq.,

Legal Counsel for the Vermont State Department of Education: "[E]ach State educational agency (SEA) must ensure that all educational programs for children with disabilities in the State meet State education standards and EHA-B requirements. 34 CFR § 300.600(a)(2)(ii). Thus, based on the above requirements, the Vermont Department of Education must ensure that private schools or facilities in which children with disabilities are publicly-placed or referred meet EHA-B requirements, including the standards that apply to State and local education agencies." The letter goes on to state that, in developing standards applicable to private schools serving students with disabilities, the requirements may not be implemented in a manner that overrides the requirements of EHA-B.

In the instant case, the private school receiving the unilateral placement by the parent did not meet State standards; among other things, the teachers did not hold teaching certificates for special education, and at least one of the student's teachers held no certificate at all. In addition, the school did not prepare individualized education programs for its students. In fact, the court below found that the school in question did not even "attempt to comply with the terms of the Act." *Carter v. Florence County School District Four*, 950 F.2d 156, 161 (4th Cir. 1991). The court below justified its suspension of the standards by restricting the application of that requirement to cases where a student was placed by a public educational agency, *Carter* at 162. We note first our view that once public funds are committed to a placement, it becomes a public placement. Even without that, however, we do not believe that Congress intended to make the rights of disabled children dependent upon the status of the placing party. Children's rights should be protected regardless of the acting party. "The EHA procedural safeguards begin with the individualized education program (IEP)." *Mrs. C. v. Wheaton*, 916 F.2d 69 (2nd Cir. 1990).

The decision of the Fifth Circuit in *Alamo Heights* required a school district to pay for a non-qualifying summer program, but in that case the school district had declined to provide any

program at all, *Alamo Heights*, at 1161. In the instant case, the school district had offered at least two appropriate placements within the district's schools, *Carter*, at 158 and 159.

The decision of the Second Circuit is in direct conflict with the decision below: "We must respectfully decline to follow the *Tucker* decision." *Carter*, at 163.

Among other things, the three Circuits disagree on the application of this Court's decision in *Burlington*, see *Carter* at 163, *Tucker* at 568, and *Alamo Heights* at 1161. If <u>every</u> program receiving funds through IDEA is required to meet standards established by IDEA and the States, then the decision in *Carter* is incorrect. If <u>no</u> program is required to meet those standards, then IDEA and related State and federal regulation will require major revisions. If only <u>some</u> programs, but not others, are required to meet those standards, then the decision of the Second Circuit in *Tucker* is incorrect, and State and local education agencies, along with parents and other advocates for the educational rights of children with disabilities, will need to receive guidance concerning the criteria to be followed in funding programs which are unable or unwilling to meet current federal and State standards.

2. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH PRINCIPLES OF LOCAL CONTROL AND THE NEED FOR SCHOOLS TO HAVE A REASONABLE MEASURE OF CONTROL OVER SCHOOL BUDGETS, PLANNING, AND OPERATIONS AS SET FORTH IN PREVIOUS DECISIONS OF THIS COURT.

In addressing a Texas residence requirement for free public education, this Court noted, "The provision of primary and secondary education, of course, is one of the most important functions of local government. Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly. The State thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public

schools." *Martinez v. Bynum*, 103 S.Ct. 1838, 1843, 75 L.Ed.2d 879 (1983).

Requirements restricting funding of education programs to those that meet educational standards are very closely related to residence requirements. If parents are able to ignore educational standards and procedural requirements as in this case, moving their children unilaterally to private placements at State or local education agency expense despite the availability of appropriate programs within the school district, then the ability of local and State governments to enforce reasonable control over education, including planning, operations, and management of budgets, will be significantly eroded. In this case, the parent disagreed with appropriate placements and prevailed in obtaining an inappropriate placement; in another recent case, a court allowed a parent to pursue a private, unilateral placement at public expense despite the court's clear finding that the public school program was appropriate, simply because the parent was "hostile" towards the public school system and placement, *Board of Education* of *Community Consolidated School District No. 21 v. Illinois State Board*, 938 F.2d 712 (7th Cir. 1991). We do not wish to be alarmists, but we fear that such decisions are seriously infringing upon the ability of the public school system to manage its affairs and provide predictable and effective services for children.

3. THE DECISION OF THE FOURTH CIRCUIT IS CONTRARY TO THE BEST INTERESTS OF STUDENTS, IN THAT IT MAY SERVE AS A DISINCENTIVE TO PRIVATE SCHOOLS TO COMPLY WITH STANDARDS ESTABLISHED BY STATE EDUCATION AUTHORITIES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

In many parts of the United States, as in the instant case, private school teachers are not required to meet State teacher certification requirements, *Carter*, at 161. Certification requirements vary among States, but typically require at least a bachelor's degree in the subject area taught, a supervised initial

teaching experience, and evidence of moral fitness. See *Manual on Certification and Preparation of Educational Personnel in the United States*, published by Kendall Hunt Publishing Company for the National Association of State Directors of Teacher Education and Certification (NASDTEC), 1991. In order to help ensure that persons who are incompetent or otherwise unfit for service in the schools for reasons such as pedophilia or other inappropriate or destructive behavior, State teacher certification offices have worked through NASDTEC to establish a teacher certification clearinghouse which allows information to be exchanged among the States, *Manual*, at O-1. Since compliance with standards is burdensome and certification requirements may eliminate potential teachers from a private school's pool of teacher applicants, elimination or modification of a requirement that all schools receiving funding for the education of children with disabilities meet State standards may lead private schools to withdraw from compliance, thereby subjecting students to greater risks of harm to their educational, mental, and moral well-being.

CONCLUSION

For the foregoing reasons, the National Association of State Boards of Education respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be granted in case no. 91-1523, *Florence County School district Four, et. al., v. Shannon Carter, By and Through Her Father and Next Friend, Emory Carter*, and the case be set for plenary review.

Respectfully submitted,

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